THE FUNCTION OF THE JUDICIARY.

I.

That peculiar contribution of the United States to law and political science—the function of the judiciary to declare legislative acts inoperative because unconstitutional—may best be studied in the decisions of the national Supreme Court. In the appendix to the 131st volume of the United States Reports, Mr. J. C. Bancroft Davis has made a collection of the cases in which the Supreme Court has declared statutes and ordinances of Congress unconstitutional. The collection is intended to be exhaustive down to the end of the October term, 1888, although it does not include the Dred Scott case, possibly because Mr. Davis did not consider that the opinion expressed in that case, that the Missouri Compromise Act was unconstitutional, was called for by the case itself.

The collection includes twenty cases in all. In eight of these, *Hayburn's Case*,[1] *United States* v. *Todd*,[2] *Marbury* v. *Madison*,[3] *United States* v. *Ferreira*,[4] *Gordon* v. *United States*,[5] *Ex parte Garland*,[6] *United States* v. *Klein*,[7] and *Kilbourn* v. *Thompson*,[8] the objection to the action of Congress in whole or in part was that that action had amounted to an interference with or an assumption of judicial power and accordingly was contrary to the principle of the separation of powers.

In eight of the other cases, *United States* v. *Dewitt*,[9] *Collector* v. *Day*,[10] *United States* v. *Railroad Co.*,[11] *United States* v. *Reese*,[12] *United States* v. *Fox*,[13] *Trade Mark Cases*,[14] *United States* v. *Harris*,[15] and the *Civil Rights Cases*,[16] the unconstitutionality of the action of Congress lay in the interference with the operations of State governments through the taxation of the salaries of State officers or the revenues of municipalities or in the exercise of powers not granted to the Federal Government, and hence falling within the residuary powers of the States.

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[1] (1792) 2 Dall. 409.
[2] (1794) 13 How. 52 (note).
[3] (1803) 1 Cranch. 137.
[4] (1851) 13 How. 40.
[5] (1864) 2 Wall. 561.
[6] (1866) 4 Wall. 333.
[7] (1871) 13 Wall. 128.
[8] (1880) 103 U. S. 168.
[9] (1869) 9 Wall. 41.
[10] (1870) 11 Wall. 113.
[11] (1872) 17 Wall. 322.
[12] (1875) 92 U. S. 214.
[13] (1877) 95 U. S. 670.
[14] (1879) 100 U. S. 82.
[15] (1882) 106 U. S. 629.
[16] (1883) 109 U. S. 3.

The four remaining cases are *Hepburn* v. *Griswold*,[1] *The Justices* v. *Murray*,[2] *Boyd* v. *United States*,[3] and *Callan* v. *Wilsons*[4] In the last three of these cases the invalidity of the Congressional action lay in the infringement of certain procedural rights, such as the right to trial by jury, which have always been claimed as a common heritage by Englishmen and Americans alike. The first of these four cases, *Hepburn* v. *Griswold*, has been reversed by a series of cases culminating in *Juilliard* v. *Greenman*,[5] and it is to the principles laid down in the latter case that these articles will be devoted as showing the limitations which the Supreme Court has placed on itself in its function of declaring acts of Congress unconstitutional.

In *Hepburn* v. *Griswold* the majority of the court, speaking by Chief Justice Chase, had expressed the opinion that while Congress unquestionably had the power to issue irredeemable paper currency, it had not the power to stamp such currency with the character of legal tender in payment for past debts. They could not find that such a power was implied in the power to coin money, nor in the power to issue notes to be used as currency, nor in the power to carry on war, to regulate commerce or to borrow money, but that even if it could be so implied, it was inconsistent with the spirit of the Constitution, and directly prohibited by the express provisions of the Constitution that private property shall not be taken for public use without compensation, and that no person shall be deprived of life, liberty or property without due process of law. It was a great opinion expressed with all the force of the great lawyer who uttered it.

It is needless to say that the opinion made a profound impression. While the question involved in it had not brought the country to the verge of civil war, as had that dealt with in the Dred Scott case, yet it had been the subject of intense political interest, and the analogy between the two cases is by no means slight. In his opinion in the Dred Scott case, Mr. Justice Wayne had said:—

"The case involves private rights of value, and constitutional principles of the highest importance, about which there has been such a difference of opinion, that the peace and harmony of the country required the settlement of them by judicial decision."[6]

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[1] (1869) 8 Wall. 603.
[2] (1869) 9 Wall. 274.
[3] (1886) 116 U. S. 616.
[4] (1888) 127 U. S. 540.
[5] (1884) 110 U. S. 421.
[6] (1856) 19 How. 393, 454.

Apparently Chief Justice Chase had a similar idea of putting the question to rest once and for all when he concluded in the following words:—

"It is not surprising that amid the tumult of the late Civil War, and under the influence of apprehensions for the safety of the Republic almost universal, different views, never before entertained by American statesmen or jurists, were adopted by many. The time was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority. If power was assumed from patriotic motives, the assumption found ready justification in patriotic hearts. Many who doubted yielded their doubts; many who did not doubt were silent. Some who were strongly averse to making government notes a legal tender felt themselves constrained to acquiesce in the views of the advocates of the measure. Not a few who then insisted upon its necessity, or acquiesced in that view, have, since the return of peace, and under the influence of the calmer time, reconsidered their conclusions, and now concur in those which we have just announced. These conclusions seem to us fully sanctioned by the letter and spirit of the Constitution."[1]

How much success attended either effort is matter of public history. The Dred Scott decision split the Democratic party and brought about the election of Abraham Lincoln as President of the United States, which occasioned the attempted secession of the State of South Carolina, and thus precipitated the Civil War. The decision in *Hepburn* v. *Griswold* was finally reversed fourteen years later in *Juilliard* v. *Greenman* by an all but unanimous court, Mr. Justice Field, who had united with Chief Justice Chase in *Hepburn* v. *Griswold*, alone dissenting.

It will not be surprising to many to find a parallel to the history of *Hepburn* v. *Griswold* in that of *Pollock* v. *The Farmers' Loan and Trust Co*,[2] the most notable case in which the Supreme Court has declared an Act of Congress unconstitutional since Mr. Davis made his collection. In that case the Supreme Court held the income tax legislation then before it unconstitutional. The interest and opposition it aroused were comparable to that aroused by *Hepburn* v. *Griswold*, and what makes it even more likely that history will repeat itself is that the decision in the latter case was by a five to four vote, and that whereas *Hepburn* v. *Griswold* decided a more or less open question, *Pollock* v. *The Farmers' Loan and Trust Co.* reversed what had been supposed to be settled law, by a large part of the legal profession.

But, to return to *Juilliard* v. *Greenman* and the more immediate subject of this article, Mr. Justice Gray, who delivered the

[1] 8 Wall. 625.

[2] (1895) 157 U. S. 429.

opinion of the court in that case, commences his opinion, as all expositions of the implied powers of the Constitution must be commenced, with the reasoning laid down by Chief Justice Marshall in *McCulloch* v. *Maryland* and quotes those words of The Great Chief Justice never to be forgotten in interpreting the Constitution, that "we must never forget that it is *a constitution* we are expounding."[1] Further, Mr. Justice Gray adds:—

"The words 'to borrow money,' as used in the Constitution, to designate a power vested in the national government, for the safety and welfare of the whole people, are not to receive that limited and restricted interpretation and meaning which they would have in a penal statute, or in an authority conferred, by law or by contract, upon trustees or agents for private purposes."[2]

The opinion then continues that the power of Congress to emit bills of credit being firmly established, it appears "to follow, as a logical and necessary consequence, that Congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments."[3] It further shows that the power to stamp these bills of credit with the character of legal tender for private debts was universally recognized at the time of the adoption of the Constitution as incident to the power to issue them. The power thus falling within the more general power to borrow money, the court can find no express prohibition of it in the Constitution, and adds that "it is no constitutional objection to its existence, or its exercise, that the property or contracts of individuals may be incidentally affected."[4]

Finally, the opinion concludes:—

"Such being our conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the government and the people, that it is, as matter of fact, wise and expedient to resort to this means, is a political question, to be determined by Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts."[5]

The three propositions here laid down which it is desired to comment on in the light of other Supreme Court decisions are:

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[1] (1819) 4 Wheat. 316, 407.
[2] 110 U. S. 444.
[3] 110 U. S. 447.
[4] 110 U. S. 448.
[5] 110 U. S. 450.

(1) that grants of power in a constitution are not to be construed by the same rules as powers of attorneys or trust deeds; (2) that subject to the prohibitions of the Constitution, the powers granted in the United States Constitution are to be interpreted in the light of the practice of civilized nations; (3) that political questions should be left for the political departments. These are perhaps but phases of the same subject, but it is believed that their separate treatment will be advantageous in view of the important bearing they have on the questions of the day. Only the first of these will be considered here, as the second and third need extensive treatment and will be taken up in the article which is to follow.

We have come to take the action of our courts in declaring acts of legislation unconstitutional so much as a matter of course that we have to guard ourselves not to forget how extraordinary this power is, not to forget the important limitation that the balance of political power is not vested in the courts. With us, as with other countries, political power is solely vested in the legislature and the executive. If the balance of political power were confided to the judiciary, we would be subjected to a veritable aristocracy of the robe, since with the long terms which are necessary to make good judges, anything like responsibility to the people on their part is impossible. Nor would it be an aristocracy in the sense of government by the most fit. Chief Justice Marshall and Lord Eldon, two of the greatest judges that ever graced any bench, are said to have made hesitating and inefficient executive officials. The habits of thought and the experience of appellate judges is not productive of aptitude for practical affairs of government.

On both these counts, therefore, their non-responsibility to the people and their non-political training, the judges have very wisely not been clothed with the balance of political power.

Granted that courts should keep strictly to the law and not grasp political power, why should not the authority of a legislature of limited powers receive the same strict construction as does the power given an individual by a power of attorney or a trust deed? Is it not even more important that the departments of the government should keep within the law than that private individuals should? True, but who has ordained the judiciary the keeper of the legislature? Or if it has been so ordained, why is not the legislature made subject to the courts' jurisdiction and process? The answer is clear. The judiciary has no such general powers over the action of the executive and the legislature

as it has over the agent and the trustee. It has no jurisdiction whatever over the executive and legislature as such, and any authority to interpret the grant of powers to them, except as the question may arise in a controversy involving individual rights, must be extraordinary and exceptional.

But admitting all this, it may be asked, in such a case as that just mentioned where the question of the authority of the legislature comes up in a controversy involving individual rights, does not the principle of the supremacy of the law require that an individual shall not suffer from an act in excess of authority to any greater degree when it is the act of the legislature than when it is the act of an individual? Should not exactly the same principles be applied in the interpretation of their powers? Here we are getting down to more strictly legal principles. But what do we find on looking for precedents? If we look at the pre-Revolutionary history of France, we find the Parliaments of Paris passing on the authority of the law-making body in refusing to register the latter's decrees. As a consequence of the popular disfavor their action met with, they were finally abolished and ever since the non-interference of the judiciary with the political departments has remained a fundamental maxim of French public law. The same thing is true elsewhere on the Continent. If we look at England, from which we derive our jurisprudence and the fundamental principle that ours is a government of laws and not of men, we find that while certain of the early cases claimed a right in the judiciary to construe the powers of the legislature, this was regarded as a usurpation, and it is now common knowledge that the English courts have no such power. Outside the United States, then, it is generally agreed that there is such a fundamental difference between the authority of legislature and the authority of an agent or trustee that far from being interpreted in the same way, the courts feel that they can not interpret the authority of the legislature at all.

Where then do our courts get such a right? Not from interpreting the grant of "judicial power" by the usages of civilized nations as we have seen the power to borrow money was interpreted in *Juilliard* v. *Greenman*, for, as just shown, most of the other nations do not consider such a right to be included within the judicial power. Not from any well-settled practice of the courts of England, for although there were dicta in support of it, there was little in the way of real precedent. Not from an express grant in the Constitution, for it took all the marvelous

powers of logic and exposition of Chief Justice Marshall to show that it was implied, and the basis of his argument has been questioned.[1]

We have, then, this situation—the courts exercising a power which its greatest expounder considered an implied one and which is denied to the courts in almost every other nation of the earth. It is not meant here, on that account, to question the right or even its expediency, for our co-ordination of departments and division of powers between the State and Federal governments necessitate its exercise by the Federal judiciary; but it is desired here to lay stress on the fact that it is an extraordinary power, that it is widely different from the right of interpreting private delegations of powers, and that the reasons which operate with other countries to deny the right altogether, operate with us also to make the rules of interpretation laid down in the one case inapplicable in the other.

The maxims that ye cannot serve two masters, that the house divided against itself will fall, that authority is indivisible, and countless others, are merely illustrations of the general principle that if there is something to be done there must be one head to do it. Europe learned that in emerging from the anarchy of feudalism, and it is embodied in her law. Our forefathers, however, were impressed by their experience with an aversion for arbitrary power, and established in the Constitution the system of checks and balances. As long as the government could do only a minimum of harm many were indifferent as to whether it could do much that was good. To-day the feeling is quite different. Increased governmental activity is desired on all hands and though we may not have the concentration which is considered so essential in Europe, we must at least have co-operation. Grants to the legislature must not be too narrowly construed. Only in the clearest possible case should acts of the legislature be declared unconstitutional, otherwise we will have what Napoleon had, a three-chambered legislature impotent for good or ill alike. Happily the law as interpreted by the Supreme Court accords with the views here expressed. It were well if the State courts had also borne more strictly in mind the injunction of Chief Justice Marshall to remember that it is *a constitution* they are interpreting.

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[1] Prof. James B. Thayer, 7 Harvard Law Review 129.